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In the Supreme Court of the United States

October Term, 1958

No. 112

NORMAN CHRISTIAN WOLFE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. App. 14-19) are not yet reported. The oral opinion of the District Court appears at R. 188-212.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1958 (Pet. App. 20). The petition for a writ of certiorari was filed on June 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the local board's failure to post names and addresses of advisors to registrants in accordance with then-existing Selective Service regulations prejudiced petitioner.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Universal Military Training and Service Act and of the regulations involved are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

Petitioner was convicted, in the United States District Court for the Eastern District of Michigan, of refusal to obey a draft board order to report for civilian work at a state hospital, in violation of 50 U.S.C. App. 456(j) and 462(a) (*infra*, pp. 11, 12). He was sentenced to three years' imprisonment (R. 2, 212, 214). On appeal (R. 216), the judgment was affirmed, one judge dissenting (Pet. App. 14-20).

1. Petitioner's selective service file was introduced in evidence as Government Exhibit 1 (R. 3, 6). The pertinent facts may be summarized as follows:

Petitioner was born on June 15, 1928, and registered with Local Board No. 14 at Dowagiac, Michigan, on September 14, 1948 (R. 97-98). He stated that he was a Jehovah's Witness minister and asked for a IV-D (minister) classification (R. 99-100). At first he was classified I-A, but he appealed and on July 28, 1950 was classified IV-D (R. 103).

On February 21, 1951, petitioner filed a conscientious objector form with the local board. In this form, he set out his religious views, and stated that he was conscientiously opposed to participation in war in any form and to noncombatant training or service in the armed forces (R. 103, 121-129).

On July 15, 1953, the President, by Executive Order 10469, issued a regulation, 32 C.F.R. 1628.30 (*infra*, p. 12), providing in part that a registrant should be classified III-A if, prior to August 25, 1953, he submitted evidence that he had a child or children with whom he maintained a bona fide family relationship. Petitioner gave the board no new information prior to August 25, 1953.

On August 28, 1953, the local board, which was reviewing all IV-D classifications, requested current information from petitioner as to his occupation and ministry work (R. 130). In a reply letter, petitioner informed the board that he was still a minister; that he now had a family obligation to his wife and two daughters, born on January 27, 1952 and May 10, 1953; and that he had taken employment at West-Wood Products, Inc. (R. 130-132). A letter dated September 17, 1953 from West-Wood Products informed the board that petitioner's employment dated back to July 1952 and that he was working 40 hours per week (R. 133).

On October 2, 1953, the board changed petitioner's IV-D classification to I-O (conscientious objector) (R. 103). In a letter to the board dated October 14, petitioner protested this I-O classification and claimed that he was still a minister even though his full time

ministry had been "altered temporarily" when his "family obligations increased" (R. 134-136). He also enclosed the birth certificates for his two children and his marriage license (R. 136, 145-147).

On November 6, 1953, petitioner had a hearing before the local board (R. 137-140). At this time petitioner submitted a letter from West-Wood Products, stating that since November 1 he had been employed only part time from 8:00 a.m. to 12:00 a.m. (R. 133-134).[1] After referring to this letter, the record of petitioner's hearing on November 6 states (R. 137-138): "[Petitioner] stated he is not doing this to be evasive, but the action of the local board (in reclassifying him into Class I-O from IV-D) did force his hand. He has his car to finish paying for, and a wife and two children to support. He did not plan to start back in full-time ministry until the first of the year. He has done this now to prove he believes in his work." The local board continued the I-O classification (R. 104).

The appeal board, in continuing the I-O classification, stated in a letter to the local board dated November 20, 1953, that petitioner "should not be classified in Class 3-A even though he is married and has two children, because there is no indication that his induction would cause an extreme hardship. Also due to the fact that he did not report the existence of his family until September 4, 1953." The appeal board also stated that petitioner was not classified

[1] On November 1, petitioner had been given an appointment as a pioneer or full time minister (R. 163-164).

IV-D since he was not devoting full time to his ministerial duties (R. 140).

On March 16, 1954, the presidential appeal board classified petitioner I-O (R. 105, 168-169). On June 14, petitioner refused to accept hospital work as ordered, and his prosecution followed (R. 106, 107, 182-185).

2. At the trial, petitioner testified that, if an advisor had been available, he would have talked to the advisor about filing information as to fatherhood (R. 26-27). He admitted, however, that it was not until 1954, after he had refused to perform civilian work in accordance with the draft board order, that he went to the local board inquiring about advisors (R. 31-32). Petitioner and his brother-in-law, Mr. Waswick, asked the clerk of the local board if the names and addresses of advisors had been posted on the bulletin board and she stated that they had not (R. 24-26, 56-57). Petitioner admitted that, prior to August 25, 1953, he knew from his original questionnaire that the draft board was interested in whether he was married and had children (R. 36-37). He also admitted having had in his possession since 1948 a selective service card No. 110, which stated that he should see his government appeal agent for advice and directed that he notify the local board "in writing of any fact which might change [his] classification" (R. 37-39).

Mr. Ibbotson, a local board member, testified that the board had as its advisor Circuit Judge Mosier, whose name appeared in the newspapers at various times when there were changes in board personnel

(R. 84). His name was also included in a book in the draft board office containing the names of all advisors in the State of Michigan (R. 85). Ibbotson testified that the local newspapers published notices of the President's executive order specifying August 25, 1953 as the deadline for submitting information for III-A classifications, and that for several weeks before that date the board was very busy accepting information regarding dependent children of registrants (R. 87-88).

Mr. Waswick, petitioner's brother-in-law, stated that when petitioner, a purchasing director in a trailer manufacturing business, was working full time for West-Wood Products until November 1, 1953, he earned $7500 per year. He earned $3750 per year after he started working only four hours a day (R. 60-64).

3. In its oral opinion finding petitioner guilty (R. 188-212), the trial court held *inter alia* that there was no basis for petitioner's contention that he should have been given a III-A classification since petitioner did not file the evidence as to his wife and two children until after August 25, 1953. The court said it might be a fair inference from the evidence that petitioner did not supply the information since he then had a IV-D classification. The court was also of the opinion that there had been no proof of hardship under the regulations, and remarked (R. 204, 205):

* * * *

> It may be that [petitioner] did not press that claim vigorously at that time inasmuch as he

was more interested in ying to get a 4-D classification. I think that was the case. * * *.

ARGUMENT

Petitioner makes no argument in support of the position taken by the dissenting judge below (Pet. App. 16-19), *i.e.*, that there was no basis in fact for the local board's refusal to classify petitioner IV-D in view of changed conditions after his I-O classification on October 2, 1953. Petitioner contends that the local board's failure to comply with regulation 32 C.F.R. 1604.41 (*infra*, p. 12), providing for posting the names and addresses of advisors to registrants, prejudiced him in that, if he had had assistance of advisors, they would have counseled preparation of a formal application for a III-A parenthood classification before the deadline date of August 25, 1953 specified in regulation 32 C.F.R. 1622.30(a) (*infra*, p. 12). By reason of this, it is argued, the draft board order for petitioner to work at the hospital was a nullity, and he should have been acquitted.

The courts have held that failure to comply with regulation 32 C.F.R. 1604.41, requiring posting of the names and addresses of advisors to registrants, is not a denial of procedural due process in the absence of a showing that such failure operated to the registrant's prejudice. *Clark* v. *United States*, 236 F. 2d 13, 19-20 (C.A. 9), certiorari denied, 352 U.S. 882; *Uffelman* v. *United States*, 230 F. 2d 297, 301-302 (C.A. 9); *United States* v. *Manns*, 232 F. 2d 709, 710-712 (C.A. 7); *United States* v. *Mekolichick*,

234 F. 2d 71 (C.A. 3); *Rowton* v. *United States*, 229 F. 2d 421, 422 (C.A. 6), certiorari denied, 351 U.S. 930. Petitioner was able to show no such prejudice in the instant case. By his own admission, it was not until 1954—long after the crucial cut-off date of August 25, 1953 for a III-A parenthood classification—that he went to the local board to inquire about the posting of names and addresses of advisors (R. 31-32). Cf. *Kaline* v. *United States*, 235 F. 2d 54 (C.A. 9), holding no prejudice was shown from failure to appoint advisors, the court stating (at p. 59): "[Registrant] further did not show that he ever checked the bulletin board for such list of advisors or ever made a visit to the Local Board office during this period. We find no merit in the contention that he was prejudiced."

It is a fair inference from the selective service record that on July 15, 1953, when the President by Executive Order No. 10469 issued regulation 32 C.F.R. 1622.30 containing the August 25, 1953 deadline, and during the period immediately thereafter, petitioner had no interest in a III-A classification, but was intent upon doing nothing to disturb retention of the IV-D classification with which he was well satisfied. He failed to notify the local board of his marriage and employment by the West-Wood Products at $7,500 per year, as he was required to do under 1625.1(b) (*infra*, p. 14), until after the local board on August 28, 1953 requested information in review of all IV-D classifications (R. 130, 131). Similarly, he failed to notify the local board of the

birth of his two children until after the cut-off date of August 25, 1953 for III-A parenthood classification under 1622.30(a) (R. 131, 135, 136), and did so later only because the board was reviewing IV-D deferments. Petitioner's selective service card had put him on notice of his duty to notify the draft board of any information which might change his classification (R. 37-39), and other registrants had learned of the cut-off from the local newspapers in time to get III-A classifications (R. 87-88). In the circumstances, it would appear that his failure to notify the draft board of his marriage, his employment, and the birth of his children, was attributable to the fact that petitioner was content with the IV-D classification which he then had. Under 32 C.F.R. 1641.2(b) (*infra*, p. 14), if a registrant "fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege." [2]

There are significant distinctions between *Steele* v. *United States*, 240 F. 2d 142 (C.A. 1), relied upon by petitioner (see Pet. 6, 13), and the instant case. Unlike the situation here where the parenthood deferment information was not disclosed until after the crucial August 25, 1953 date, in *Steele* the registrant told the local board before that date of his wife's pregnancy and asked for either a III-A or IV-D classification (240 F. 2d at 144). In *Steele*, moreover, no

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[2] The record does not show extreme hardship to dependents to warrant a III-A classification under 32 C.F.R. 1622.30(b), and petitioner does not argue extreme hardship.

advisors had been appointed; here an advisor had been named, but his name had not been posted. There is therefore no conflict.

Moreover, the question involved is not of sufficient current importance to warrant review, in view of the amendment of 32 C.F.R. 1604.41, making appointment of advisors to registrants optional. This regulation was amended on January 31, 1955 (E.O. 10594, 20 F.R. 735, 737) by changing "shall" to "may" in the provision for appointment of advisors.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1958.

APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) (50 U.S.C. App. 456 (j)):

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) (50 U.S.C. App. 462(a):

> Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C.F.R. (1951 Ed.) 1604.41:

> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

32 C.F.R. (1954 Ed.) 1622.30:

> (a) In Class III-A shall be placed any registrant who prior to August 25, 1953, has submitted evidence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their

home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

(c) (1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

(2) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to August 25, 1953, and prior to the time the local board mails him an order to report for induction which is not subsequently cancelled for a reason not related to the filing of the certificate hereinafter mentioned, there is filed with

the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

* * * *

32 C.F.R. (1954 Ed.) 1625.1:

* * * *

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

* * * *

32 C.F.R. (1954 Ed) 1641.2:

* * * *

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.

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